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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 430

HOSKYN & CO., INC., *et al.*, *Petitioners,*

against

SILVER LINE, LTD., *Respondent.*

INTERNATIONAL STANDARD ELECTRIC CORP., *et al.*, *Petitioners,*

against

SILVER LINE, LTD., *Respondent.*

CHINA GENERAL EDISON CO., INC., *Petitioner,*

against

SILVER LINE, LTD., *Respondent.*

BRIEF OF RESPONDENT SILVER LINE, LTD. in opposition to PETITION FOR WRITS OF CERTIORARI

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Preliminary Statement

The petitioners seek Writs of Certiorari addressed to the United States Circuit Court of Appeals for the Second Circuit to the end that the affirmance by the Circuit Court of Appeals for the Second Circuit of the judgments of the

United States District Court for the Southern District of New York may be reviewed here.

Eighteen libels were filed in the District Court in or about the early part of 1938 as a result of a fire on board respondent's vessel, the M. V. SILVERCYPRESS, on January 13, 1937 while anchored in the harbor at Ilo Ilo, P. I. These libels were by the order of the District Court consolidated for the purpose of trial under the title of *Hoskyn & Co., Inc.* against *Silver Line, Ltd.*

Before trial, counsel had selected the following four cases as typical and stipulated that the decision as to the cause and liability for the fire in those cases would control the decision of the other fourteen cases upon that issue: Hoskyn & Co., Inc., et al.; International Standard Electric Corp., et al.; China General Edison Co., Inc.; Pacific Commercial Company.

The cases were tried as one before the District Court for twelve consecutive court days. The trial ended April 22, 1942. Subsequently, exhaustive briefs were submitted to the District Court by both parties. The District Court on January 11, 1943 filed an opinion dismissing all of the libels. (R. pp. 1296-1332) On March 25, 1943, the Court filed a supplemental opinion. (R. pp. 1332-1337) In that opinion it found in favor of libellant in the case of *Pacific Commercial Company* on the ground that as the proximate cause of the loss was the over-carriage of the goods from Manila to Ilo Ilo and not the fire, respondent was not entitled to the benefit of the Fire Statute. Decrees were entered in the District Court in favor of the respondent in the first three of the above cases and in favor of libellant in the fourth case. Because of the small amount involved ($80.) in that case, respondent did not feel that an appeal was warranted. Petitioners appealed from the decrees in the first three cases and the United States Circuit Court of Appeals for the Second Circuit affirmed the decrees in those cases with a decision written by Judge CHASE on June 8, 1944 (143 Fed. (2d) 462). Petition for a rehearing was denied on June 26, 1944.

Although petitioners claim there is a conflict with decisions of other Circuit Courts of Appeal, as explained below (Point III), there is no such conflict. None of the reasons set forth in Rule XXXVIII 5(b) is present in this case. The sole question presented to this Court is whether the petitioners discharged the burden which petitioners concede in their brief (p. 10) is placed upon them by the Fire Statute (46 U. S. C. 182) of showing that the fire was caused by respondent's neglect. The District Court ruled on the facts that they did not meet that burden and the Circuit Court of Appeals affirmed this ruling on the facts.

The following language from Judge CHASE's opinion shows the precise nature of the question involved and, by the same token, makes obvious the reasons why certiorari should not be granted. *Inter alia,* Judge CHASE wrote:

> "It was accordingly found, and is not now seriously disputed, that the vessel was unseaworthy when she sailed and continued to be unseaworthy up to the time of the fire, and that such condition was due to the neglect of the owner. Consequently the issue is further narrowed to the question whether it was shown that the neglect of the owner which allowed the No. 2 starboard auxiliary to be used while it remained in the condition that made the ship unseaworthy caused the fire. Compare *Christopher* v. *Grueby,* 1 Cir., 40 F. (2) 8.
>
> "This was an extremely difficult question to resolve in point of fact because the engine room was gutted and when it could be entered after the fire so much damage had been done that no definite evidence concerning the cause of the fire could then be obtained.
>
> "Some facts as to conditions in the engine room just before the fire were proved, however, and there was evidence that a relief valve in one of the engine's cylinders then opened and let out hot gases and sparks. The libellants directed most of their energies to attempting to show that the fire was caused by the spraying of oil from a small intake pipe against the hot exhaust pipes and the hot cylinder head when excessive vibration caused the pipe to break. Yet there was no

evidence that such a pipe did in fact break before the fire started. The respondent put forth a (fol. 1373) contrary theory supported by the testimony of its expert to the effect that an overhead fuel pipe in the engine room might have sprung a leak, with results later to be given. Yet there was no credible evidence that such a leak did occur so all was left to speculation. Such an occurrence, however, could not reasonably be connected with the owner's proved neglect to repair the engines. So there was expert testimony pointing to a possible cause of the fire connected with the owner's neglect to put the auxiliaries in good repair after notice and testimony just as expert pointing to a possible cause unconnected with any neglect of the owner. There was also evidence of an unusual loss of lubricating oil but that, too, indicated only a lack of engine repair and mostly in respect to the main engines which were idle when the fire started. The trial judge could not find whether either theory as to the cause of the fire was the correct one, or what did in fact cause it.

"The word 'theory' has been used deliberately for it is apparent that no one can do more on the evidence in this record than to speculate, and right there the weakness of the libellants' cause is revealed. The statute placed upon them a burden it was impossible to carry, as will now be seen from a discussion of the available and proved facts in connection with the operation of a Diesel engine of the multiple-cylinder four-cycle type of the auxiliaries in this vessel."

After discussing the evidence adduced, Judge CHASE concluded:

"It is no wonder that on this sort of evidence the trial judge could not decide which, if either, of these theories showed how the fire was caused or find what as a matter of fact did start it, and he had to leave that vital question unanswered. There is, therefore, nothing in this record which shows reversible error in respect to any of the decrees.

"On the contrary there is ample support for the negative finding that the cause of the fire was not

proved. Consequently it was not shown that any neglect of the owner caused it and such a finding is to be given effect on appeal. Compare *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.*, 2 Cir., 126 F. (2) 992. That leaves the libellants short of having proved a cause of action, for the unseaworthiness of the ship did not alone deprive the respondent of the benefit of the fire statute. *Globe & Rutgers Fire Ins. Co.* v. *United States, supra.*"

The United States District Court for the Southern District and the United States Circuit Court of Appeals for the Second Circuit, after an exhaustive review of the facts, held that petitioners did not show that the fire was caused by respondent's neglect. The Supreme Court of the United States is now asked to be the third court to pass on that factual question.

The petition falls squarely within the frequently announced rule of this Court that "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

General Pictures Company v. *Electric Company* (1937), 304 U. S. 175, at page 178;

Southern Power Company v. *N. C. Public Service Company* (1923), 263 U. S. 508.

Statement of Fact

At the trial petitioners read into the record the testimony of one Ingram, a disgruntled and thoroughly discredited former employee of the respondent, with respect to conditions in the engine room of the vessel. Ingram had been an engineer on the SILVERCYPRESS and was present in the engine room immediately before and at the time the fire broke out. (Opinion of the District Court (3981-3982, 3990; 2700-2727, 2736-2785, 3195-3212, 3220-3231.*) Ingram was the only factual witness called by petitioners.

* References are to folios of the record unless otherwise stated.

The only other witness called by them was an expert on Diesel engines.

Prior to the trial, pursuant to an order of discovery, a large number of documents was produced from the files of respondent, many of which were offered in evidence by petitioners and many by respondent. (Opinion, District Court, 3897)

On its behalf, respondent called as witnesses or read into evidence the depositions of various of its engineers and others. It also called as witnesses three experts thoroughly familiar with the operations of Diesel engines. (722, 1310, 1768, 1774, 2021-2027, 2062, 2072-2080, 2152, 2244, 2264-2271, 2818-2950, 2951-3053, 3050-3194)

The SILVERCYPRESS under Lloyd's inspection and at the time of the fire was classed by Lloyd's as + 100 A-1. (3077) She was a modern vessel built in 1930, being completed in June of that year. She and other ships of the respondent made around-the-world voyages carrying cargo and passengers from the United States to Manila and Far East ports where they also picked up cargo and passengers for the return to the United States. Each voyage took about four and one-half months to complete. (724, 3056, 3060, 3061) The voyage on which the fire occurred commenced at New York on November 24, 1936. Thereafter, on the afternoon of January 12, 1937, the SILVERCYPRESS brought up to anchor in the harbor at Ilo Ilo, P. I. Immediately after anchoring at 3:30 P. M., the ship commenced discharging cargo from all holds. This continued throughout the night and until the fire broke out in the engine room at 3:45 A. M. on the 13th. The fire took hold very rapidly and within a matter of a few minutes after the start of the fire, flames and sparks coming out of the engine room skylights were blown aft and ignited the cargo in the after holds of the ship, the hatch covers being off all holds to permit the unloading of the cargo. The fire burned for over seven days, not being extinguished until January 20, at 4:20 P. M. (Chief Officer's Log, Exs. 4-35-a; 4-35-c; 3517; Lib. Ex. 21, at 3666)

Other pertinent facts will be referred to hereafter.

POINT I

The District Court's and the Circuit Court of Appeals' finding on the facts that the cause of the fire was not proved being amply supported by the evidence should not be disturbed.

The District Court in its Supplemental Opinion (3997) succinctly stated its reasons for dismissing the libels in the following language:

> "Inasmuch as the record disclosed that the fire resulted from one of two or more causes, and the causal connection between the fire and any particular cause and the personal negligence of the Respondent was not established by the required measure of proof, the Respondent was exonerated under the Fire clause."

The pertinent finding of fact was:

> "8. The precise origin of the fire was not established and resulted from one of two or more causes." (4019)

and the Court's conclusion of law was:

> "3. The libellants failed to establish, by the required measure of proof, a causal connection between the fire which destroyed the 'Silvercypress' and her cargo, and the unseaworthiness of the vessel due to the personal neglect of the respondent.
>
> "4. The respondent is, therefore, entitled to the benefit and protection of the Fire Statute, * * *." (4022)

The Circuit Court of Appeals in commenting on and in concurring with the District Court's finding of fact stated:

> "On the contrary there is ample support for the negative finding that the cause of the fire was not proved." (C. C. A. Opinion, p. 1375)

Accordingly, since the District Court and Circuit Court of Appeals have found as a fact, which fact is amply supported by the evidence (as hereinafter demonstrated), "* * * that the cause of the fire was not proved," such finding should not be disturbed.

Just v. *Chambers* (1940), 312 U. S. 383;
Texas & No. O. R. Co. v. *Ry. Clerks* (1929), 281 U. S. 548.

POINT II

The District Court and the Circuit Court of Appeals properly found that the cause of the fire was not proved.

The fire started on the top of or near the No. 2 auxiliary generator. Petitioners' "theory" of the fire is that the No. 2 generator was overheated from improper timing, that excess vibration due to the faulty condition of the engine broke or fractured a ⅛" fuel pipe leading from a fuel pump on the No. 2 generator to a cylinder of that generator, that the break or fracture of the small fuel pipe resulted in the spraying out of a cloud of oil in vapor form which came in contact with the overheated engine, thus causing the fire, and that the fire was supported by large quantities of lubricating oil which had escaped from the crankcases of the main engines. (Opinion, C. C. A., pp. 1371-1374)

No eyewitness testified to any such conditions existing at the time of the fire. The "*theory*" consisted merely of conclusions drawn by petitioners from purely circumstantial evidence. (Opinion, C. C. A., p. 1372) Their own factual witness Ingram, who was present in the engine room before and at the time of the fire, did not testify to the existence of any such conditions at the time of the fire.

Petitioners' "*theory*" as to the cause and the extent of the fire necessarily implies: (a) abnormal vibration of

the No. 2 generator causing a ⅛" pipe (carrying one gallon of fuel oil an hour) to break; (b) late timing of the generator causing the exhaust manifolds to become overheated; and (c) large quantities of lubricating oil on the tank tops and in the bilges.

A. Vibration

We deal first with petitioners' contention that the fire was caused by the breaking of a small ⅛" fuel pipe, which break was caused by vibration resulting from the unseaworthy condition of the engine. This point was urged strongly below both in the District Court and the Circuit Court of Appeals. The District Court, however, made no finding that any vibration, abnormal or otherwise, existed in these engines, particularly in No. 2, or that such a small fuel pipe broke, and the Circuit Court of Appeals expressly found that there was no evidence "* * * that there was vibration which in fact caused a leak in a fuel pipe in the manner described." (Opinion, C. C. A., p. 1374)

The testimony of petitioners' own factual witness Ingram negatives the inference that there was any abnormal vibration present in these engines. Ingram testified in one of his several opinions as to the cause of the fire that in his opinion one of the small ⅛" pipes on the No. 2 generator fractured due to vibration caused (according to him) by the *tieing back of the governor handle or throttle on that generator.* (2663, 2673) When the load was taken off that engine, this tieing back is said by him to have caused the engine to race and, accordingly, vibrate. (2663) Ingram does not otherwise refer to vibration of the generator at all. Ingram's explanation for vibration is not advanced by petitioners for obvious reasons. It was shown definitely on the trial that it would have been a mechanical and electrical impossibility to operate the generators at all under the conditions prevailing previous to and at the time of the fire with the governor handles tied back. (C. C. A. Opinion, pp. 1373-4; 2029, 2131, 2341, 2498)

The District Court did not believe Ingram's impossible story. Indeed, even petitioners' expert did not believe Ingram's testimony (561) and did not use it as a basis for any opinion expressed by him. He admitted that the No. 2 generator could not have operated with the governor handle tied back. (2498) After offering Ingram's testimony, petitioners do not now rely upon it at all, nor could they, as it contradicts their theory of vibration. It seems obvious that if any abnormal vibration existed, Ingram, the disgruntled employee, need not and would not have invented his impossible story to explain the supposed breaking of the small fuel pipe.

Thus, petitioners' case as to vibration was founded only on the opinion testimony of their expert witness. His opinion, however, was only to the effect that there "might have been" abnormal vibration in the engines. (337, 339) His opinion was based on an examination of the records and exhibits in the case. His testimony that there "might have been" vibration is flatly contradicted by all of respondent's fact witnesses and is negatived by petitioners' own witness Ingram, who testified, as pointed out above, that vibration only existed when the load was taken off the generator and the governor handle tied back, a condition which petitioners' expert rejected as impossible. (777, 785, 1391, 2498) It was further refuted by the respondent's experts who (from an examination of the same records as were examined by petitioners' expert) gave as their opinions that there was nothing in such records to indicate any abnormal vibration in any of the generators. (2114, 2319) Under these circumstances, it is obvious why the Circuit Court of Appeals found as a fact that there was no evidence "* * * that there was vibration which in fact caused a leak in a fuel pipe in the manner described" (C. C. A. Opinion, p. 1374) and why the District Court made no finding that any vibration, abnormal or otherwise, existed in these engines or that it caused a fuel pipe to break.

B. Timing

Petitioners lay emphasis here, as they did in the District Court and the Circuit Court of Appeals, upon an alleged defective condition of the timing apparatus on the No. 2 generator. The reason for this emphasis is the assumption by the petitioners that *if* the so-called "late timing" could be established as having existed at the time of the fire, it would necessarily lead to the inference that the engine itself, or at least the exhaust pipes or exhaust manifold of that engine, was white hot, and to the further inference that loose fuel oil escaping from the assumed fracture of a small fuel pipe on No. 2 generator was ignited by these white hot exhaust pipes or manifold. It is obvious, therefore, that this is a theory as to the cause of the fire built upon a number of successive inferences, none of which is justified by the known facts.

Before examining the successive steps necessary to sustain this theory and pointing out their speculative natures, respondent calls attention to the fact that the Circuit Court of Appeals found that there was no evidence that faulty timing "did in fact overheat the engine just before the fire" (C. C. A. Opinion, p. 1374), and the District Court made no finding that the timing of the No. 2 generator was "late" or that the engine was overheated at the time of the fire.

Every instance which appears in the record of any "late timing" of the engines is definitely shown by the factual witnesses or by the records to have been corrected long before the fire. (754, 756, 761, 763-4, 1291, 1424, 1428-1431, 1717, 2088-2097, 2115, 2303, 2318, 2349-50) Since petitioners did not establish that "late timing" existed at the time of the fire, the subject becomes of no importance because it is not claimed, nor could it be, that "late timing" of an engine at an earlier date created an overheating of the engine exhaust or manifold at the time of the fire.

That the timing of the generators, particularly the No. 2, was in order on Voyage 17 and on the night of the fire is substantiated by the testimony of petitioners' own factual

witness Ingram as well as by other witnesses. Ingram makes *no mention whatsoever* of the alleged defect or looseness in the sprocket wheel of No. 2 generator which, if it existed, petitioners contended would result in late timing. Furthermore, he admitted in his testimony that the "late timing" which may have existed on a previous voyage had been corrected before the start of the voyage on which the fire occurred. (2618)

It thus appears that petitioners' contention here and in the District Court that late timing existed in the No. 2 generator at the time of the fire is not only based upon inference but is contrary to the known facts.

Moreover, the known facts do not sustain petitioners' contention that an overheated exhaust pipe or manifold ignited the fuel oil. The *known and undisputed* fact is that the safety or relief valves on the Nos. 2 and 3 cylinders of the No. 2 generator had been opening intermittently for some minutes before and up to the start of the fire with the result that white hot flames and sparks were being shot out from them. (2626, 2822, 3586, 3607, 3623, 3649; District Court Opinion, 3919) It further disregards the fact *admitted by all of the witnesses,* including petitioners' own expert, that the white hot flames and sparks shot out from the relief valves could, without any intervening cause, ignite loose fuel oil on or in the vicinity of the No. 2 generator. (630, 1480, 1813, 2142, 2338) Ingram referred to another possible cause for the ignition of fuel oil in his eyewitness reference to sparks being thrown out by the No. 1 generator commutator. (3609)

C. Lubricating Oil

Petitioners' brief (Point II) states that leakage of lubricating oil in the two main engine crankcases was an inevitably important contributing cause of the fire on the SILVERCYPRESS.

As a matter of fact, lubricating oil is not once mentioned in the findings of the District Court, and the Circuit Court of Appeals expressly found that leakage of

lubricating oil was not a contributing cause of the fire (C. C. A. Opinion, p. 1371), although in both courts this point was strongly urged by petitioners.

The statements in the District Court's opinion referred to by the petitioners in their brief at pages 28 and 29 merely recount testimony of witnesses as to whether or not there was a loss of lubricating oil on the previous voyage, and conjectures as to how such loss may have occurred. There was no finding by the District Court on the subject of the presence of lubricating oil on the tank tops or in the bilges. Furthermore the comments in its opinion relate to the previous voyage and the subsequent repairs made in New York included tightening all holding down bolts on both main engines, removing and cleaning the sealing bars on the starboard engine and rejointing them, and rejointing the worst sealing bars in the port engine. There is no mention of any loss of lubricating oil in any of the testimony subsequent to these repairs; nor is there a single word of testimony that there was lubricating oil on the tank tops or in the bilges at any stage of Voyage 17. Indeed the evidence is to the contrary. (Exhibit LL; 933-936)

Moreover, there is no evidence that even on the previous voyage the so-called "shortage" found its way to the tank tops or the bilges or that if it did it would have contributed to the fire on Voyage 17. In fact, there is a real question of whether there was any leakage at all.

The Chief Engineer of the SILVERCYPRESS did not believe that lubricating oil was leaking out of the crankcases of the main engines. In an endeavor to account to his owners for a "shortage" of lubricating oil, he reported by letter on September 25, 1936 that

> "I have made a thorough examination of cofferdams, dry tank, tank tops and pipe lines and have not been able to find any appreciable leakage. * * *
>
> "* * * I think there can be no doubt the reason for this big shortage is entirely due to the amount of sludge and water taken from the system. * * * I

have not been able to find out how the water got into the system; * * *." (Lib. Ex. 4-25, 3459, 3460)

Moreover, in a further report to his owners, dated December 2, 1936, he again attributed the "shortgage" to contamination by sea water leaking into the main engine lubricating oil system rather than to oil leaking out. (Lib. Ex. 4-28-b, at 3483) Others were of the opinion that there was no shortage and hence no appreciable leakage but that the lubricating oil was being *consumed* in the engines. 797, 1356, 2277-2281) But even if we assume that the "shortage" of lubricating oil was fully accounted for by leaks rather than by contamination by sea water or consumption, and even if we assume that the lubricating oil went on to the tank tops and from them into the bilges, nevertheless, such loss over a period of seven months would not be material in so far as the fire on January 13 was concerned.

The construction of the tank tops was such that no substantial quantity of oil could accumulate on them. (Resp. Exs. PP and ZZ; 905, 3808, 3856) Not only the construction of the tank tops but the constant rolling of the ship at sea makes it inevitable that any liquid, either water or oil, present there would go into the bilges. Moreover, they were hosed down each Saturday (792), and respondent's second engineer testified that they were clean the Saturday before the fire. (794-5) Petitioners imply, at page 30 of their brief, that the second engineer was testifying untruthfully when he stated that the tank tops were hosed down each Saturday. They neglect to point out that his testimony to that effect was substantiated by their own witness Ingram. (2565)

The 6,000 gallon loss of lubricating oil reported on the previous voyage and referred to by petitioners in their brief consisted of a "shortage" of 4950 gallons on the voyage to Hongkong and 1440 gallons between Singapore, the next port of call after Hongkong, and New York. (Lib. Exs. 4-39, 4-28-b, at 3533, 3482)

The tank tops, bilges, etc., were thoroughly cleaned at Hongkong on the previous voyage. (Bill of A. Hong, Lib. Ex. 4-21-c, at 3424; 909-12) Hence, any shortage prior to that time certainly has no bearing on the fire. The recorded "shortage" between Singapore and New York of 1440 gallons on that voyage, divided by the number of days shown gives a "loss" of about 24 gallons per day. This would mean that no more than 4 gallons could leak out during any one watch of which presumably 2 gallons would be on the starboard side and 2 gallons on the port side, and, of course, it is undisputed that the bilges were pumped out each watch. (797-8, 2686) Furthermore, the main engines had not been running from 2:49 of the afternoon of January 12, the day previous to the fire (Chief Officer's log Ex. 4-35 a, b, c, at 3517; C. C. A. Opinion, p. 1371), so that no oil could have leaked out from that time until the fire, and the bilges had been pumped just before going into port. (797) Petitioners, however, have intimated that although the bilges were pumped out each watch and had been pumped out before going into Ilo Ilo, nevertheless, a large quantity of oil still could have remained in the bilges. This is an inference contrary to the facts. The evidence shows (1022) that the bilge pump suctions, which are at the after end of the engine room bilges, are no more than 3 inches from the bottom of the bilges and that the vessel being down by the stern, all the contents of the bilges would be pumped out except for a small bit in the immediate vicinity of the bilge suctions.

Even petitioners' witness Ingram (2567) says there was only a "skim of oil on the water" in the bilges the day before the fire; in other words, a trace of oil which, of course, is present in any motorship. That they were in normal condition was confirmed by respondent's witness. (797-8)

Obviously, if there had been any substantial accumulation of oil on the tank tops or in the bilges, not only Ingram, but the other engineers would have seen it, and the Chief Engineer would have reported it. It is ridiculous to be-

lieve that the Chief Engineer would have wasted his time trying to account to his owners for a "shortage" of lubricating oil if it had shown up on the tank tops or in the bilges. Similarly, Ingram would have seized upon this as one of his most vital criticisms of the ship rather than a casual reference to a "skim" of oil.

Furthermore, we point out that the Chief Engineer's list of repairs (3505, *et seq.*) to be made at Hongkong on the last voyage made no reference whatsoever to any defective condition of the sealing bars and holding down bolts in either main engine and no reference to any leakage of oil from those engines.

Reference is made in petitioners' brief to their witness Ingram's testimony that shortly after the fire broke out, flames mounted up on the other side of the engine room. However, they neglect to point out that Ingram did not attribute the outbreak of fire on the port side to the alleged leakage of lubricating oil. (2666, 3656-8)

From the above it is apparent that petitioners failed to prove the three essential elements necessary to their theory as to the cause of the fire, namely (a) vibration which caused the breaking of a pipe; (b) defective timing which caused the engine to overheat; and (c) leakage of lubricating oil which caused the fire to spread. Proof of all three elements is necessary to sustain petitioners' theory and hold the respondent for the fire. This is a case where failure of proof went, not only to one essential element but to all three. Petitioners failed in the following respects: (a) They drew one inference when several might have been drawn. (b) They disregarded known facts material to any explanation of the fire. (c) They based inference upon inference as a substitute for proof.

Respondent's Theory Concerning the Cause of the Fire.

Petitioners' "theory" as to the cause of the fire ignores the only two things that are *known* concerning conditions in the vicinity of the No. 2 generator at the time the fire

broke out. These are (1) that the relief or safety valves on the No. 2 and 3 cylinders of the No. 2 generator, as pointed out above, were lifting and discharging white hot flames and carbon sparks; (2626, 2681, 2723, 2822, 2852, 2867, 2921, 3586, 3609, 3623, 3630, 3647, 3649) (2) that there was a considerable quantity of fuel oil on the floor plates at the forward end and outboard of the No. 2 generator just previous to and at the time of the fire. (2634, 2674, 3608; Diagram, 3616, 3665)

Respondent's witnesses testified that in their opinion (which took into consideration the known facts) the fire occurred in the following manner:

A large overhead fuel pipe broke or sprang a substantial leak. [Concededly, the breaking of such an overhead fuel pipe could not be charged to respondent's neglect. (C. C. A. Opinion, pp. 1371, 1375)] The oil therefrom fell or was sprayed onto the cylinder tops and around the No. 2 generator and an unknown quantity of this oil, falling on the air intakes of the cylinders, was drawn into the cylinders by suction, causing overloads in the cylinders, the overloads causing the relief valves to lift; that part of the oil which fell from the large overhead pipe on to the generator itself was heated to its fire point by the normal operating heat of the generator, and gave off an inflammable vapor; the continuous opening of the relief valves (caused by the excess oil from the air intake overloading the cylinders) permitted hot carbon and flame to shoot out at each explosion and, thus coming in contact with the vaporized oil, ignited it. (1473-86, 1813-15, 2138-45, 2335-41; Dist. Court Opinion, 3968-3981; C. C. A. Opinion, pp. 1374, 1375)

That fuel oil leaking from an overhead fuel pipe sucked into the air intakes would bring about a condition of excessive fuel in the cylinder which in turn would cause the relief valves to lift with the result that the loose fuel oil admittedly in the vicinity heated to its fire point by the normal operating heat of the generator would be ignited was admitted by everyone, including petitioners' expert.

(C. C. A. Opinion, pp. 1374-5; 594, 630, 1479, 1480, 1813, 2141-2, 2338) Unlike petitioners' "theory", this theory does not require an *inference* that the exhaust manifolds were abnormally heated, for, as pointed out above, the white hot flames and carbon shot out from the lifting relief valves admittedly would have been sufficient to ignite the loose fuel oil.

Respondent's witnesses pointed out that there was no other source for the large quantities of fuel oil which ignited immediately, nor any explanation other than the breaking of a large fuel supply pipe for the size of the fire which filled the engine room in a few minutes. In commenting on petitioners' theory that a *small* fuel pipe or by-pass valve on the No. 2 generator fractured, they testified that in their opinion the quantity of fuel oil, amounting to about *one gallon an hour*, which would flow from such broken 1/8" fuel pipe or by-pass valve could not have caused the fire of the magnitude described by Ingram. (2143, 2339, 2406) Their opinion also finds support in the written statement made by one of respondent's engineers after the fire (3689) that a 3/4" branch overhead fuel pipe had been found broken off and his testimony covering his conversation with Ingram after the fire. (1796) Once this fuel supply pipe was broken, oil would continue to flow out of it by gravity until the tank—said by Ingram to contain 1700 gallons (2683) was empty. It is further borne out by Ingram's testimony that there was a considerable quantity of fuel oil on the floor plates at the forward end of and the outboard side of the No. 2 generator just previous to and at the time of the fire. (2634, 2674, 3608; Diagram, 3616, 3665)

The breaking or leaking of a large overhead fuel pipe is almost the only explanation for the presence of the fuel oil that Ingram states he saw glistening on the floor plates.

This oil, Ingram stated, extended the whole way from where he was standing (Diagram Ex. 19, 3616) around back of the generator No. 2 and to the starboard bilge outboard.

As heretofore pointed out, the presence of this oil is not even mentioned by petitioners in their brief. That it was fuel oil is absolutely clear from Ingram's testimony to the effect that he knew it was fuel oil because it was the color of brandy, whereas lubricating oil is greeny blue in color. (2635)

There are many reasons which might cause such an overhead pipe to break, among them the following: The rolling of the ship in a seaway which causes the weights in the engine room to pull away from the side of the ship which sets up strain, resulting eventually in the fracturing of pipes. (1392, 1576) Crystallization of the metal is another cause of pipes giving out. (2048) The laboring of a ship in heavy weather will cause pipes to fracture, although such fractures may not show up for some time after the heavy weather was encountered. Pipes break or fracture for no apparent reason whatsoever. (430, 2147, 2356-7, 2417)

Petitioners in their brief imply as they did below that it is far-fetched to believe that if the leak had occurred in an overhead pipe, the men in the vicinity would not have been covered with oil while standing at the No. 2 generator. However, as no one knew the exact location of the overhead fuel pipe, no one can say for certain where the break or fracture occurred. (1987, 2196) Furthermore, no one knows in what way the oil would have been falling out from the break or fracture. It might have sprayed in any direction. It was the considered opinion of the experts that it did not necessarily have to fall straight down, nor that it would necessarily fall upon the two men standing at the No. 2 generator. (2199-2202, 2408)

It is thus apparent that the inferences which petitioners sought to draw, and which inferences ignore the two known facts in this case, *i. e.*, the lifting of the relief valves and the quantity of fuel oil on the floor plates at the forward end and outboard of the No. 2 generator, are not the only or probable ones which can fairly and reasonably be drawn from the facts. Nor, as shown above, did petitioners'

theory as to the cause of the fire fairly and reasonably exclude any other explanation for it.

It is thus obvious that the finding of the District Court and the Circuit Court of Appeals that the cause of the fire was not proved and that petitioners accordingly failed to meet the burden placed upon them by the Fire Statute is amply supported by the evidence.

POINT III

The cases cited by petitioners in their brief are not in conflict with the decisions below. Nor were petitioners required to carry more than the ordinary burden placed upon them by the Fire Statute.

It was and is conceded by petitioners that the so-called Fire Statute applied in these cases; that the burden was upon them to show that the fire which destroyed or damaged their cargo was caused by the neglect of the owner and that it is immaterial whether the vessel was or was not seaworthy. (Petition, p. 10)

Accordingly, the situation was like any other where a claimant brings himself within an exemption in which event the libellant must prove that he was negligent.

> *Globe & Rutgers Fire Ins. Co., et al.* v. *U. S. A., et al.* (*The Zaca*), C. C. A., 2nd Cir. (1939), 105 Fed. (2d) 160; cert. denied, 308 U. S. 611.

There can be no argument with the cases cited by petitioners in their brief. Nor is there any conflict between the decision below and the decisions of other Circuit Courts of Appeal cases. In fact, we agree entirely with the principle laid down in the cases cited from other Circuit Courts of Appeal. That principle is that a recovery should be allowed only where the only reasonable inference which can be drawn from all the circumstances lead to the conclusion that the negligence of the person sought to be charged

with liability was a *substantial factor* in causing the injury for which indemnity is sought. In other words, that the owner was guilty of neglect which caused the fire.

Globe & Rutgers Fire Ins. Co., et al. v. *U. S. A., et al.* (*supra*);

Interlake Iron Corp. v. *Gartland S. S. Co.*, C. C. A., 6th Cir. (1941), 121 Fed. (2d) 267; cert. denied, 314 U. S. 681.

In the instant cases, however, both the District Court and the Circuit Court of Appeals found on the facts that petitioners failed to show that it was the owner's neglect which caused the fire.

Both courts found that on the evidence it could not be decided "how the fire was caused or find what as a matter of fact did start it, * * *." (C. C. A. Opinion, pp. 1372, 1375) Under such circumstances, petitioners did not meet the burden concededly placed upon them by the Fire Statute, for, as stated by this Court in *Commercial Molasses Corporation* v. *New York Tank Barge Corporation* (1941), 314 U. S. 104, at page 112, "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."

See also, *Boston C. C. & N. Y. Canal Co.* v. *Seaboard Transportation Co.*, C. C. A., 1st Cir. (1921), 270 Fed. 525; cert. denied, 256 U. S. 692.

The petition should be dismissed.

Respectfully submitted,

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CPY7595